Amanah International Finance Sdn Bhd v Tan Sri Halim bin Saad and another suit

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS WA-22M-465–09 OF 2018 AND WA-22M-523–10 OF 2018
MOHD RADZI HARUN J
6 MAY 2024

Contract — Illegality — Banking facility — Whether substantial portion of Shariah banking facility granted by plaintiff to businessman was invalid for not being Shariah-compliant — Businessman alleged RM20,250,000 plaintiff disbursed to his nominee to buy plaintiff's shares in company should not be claimed from him as ownership of the shares was disputed and shares were never transferred to nominee — Whether share-sale to nominee was void for being non-Shariah compliant as ambiguity/vagueness ('Gharar') existed in respect of who their true owner was — Whether businessman's argument was in fact a red herring as evidence clearly showed plaintiff owned the shares free of encumbrances and that the share-sale was untainted by any illegality

The plaintiff ('AIF') had granted businessman Tan Sri Halim bin Saad ('TSH') an RM80m short-term financing facility ('the facility') to enable him to buy securities in Shariah-compliant Malaysian companies approved by the plaintiff. The facility was subject to the Tawarruq concept of Shariah banking. Following the execution of the facility agreement, AIF disbursed RM20,250,000 under the facility to TSH's nominee, ATAR, to buy 20 million shares that AIF held as chargee in Efogen Sdn Bhd ('the Efogen shares'). When AIF filed the instant suit against TSH claiming payment of RM62,031,201.48 together with *Ta'widh* (compensation charges for late payment) on the ground that TSH had defaulted under the facility agreement, TSH counterclaimed for a declaration that the entire Efogen share purchase transaction was void for breaching Shariah principles and that, accordingly, all disbursements AIF had made under the facility to enable ATAR to buy those shares were invalid and should be refunded to TSH. TSH contended that he derived no benefit from the purported Efogen share sale to ATAR because, owing to disputes over the ownership of the shares, they were never transferred to and registered in ATAR's name. In a separate action, AIF had sued Hektar Premier sdn Bhd ('HP') as a surety for payment of RM62,190,325.63 owed to AIF by TSH. The suit was premised on HP's undertaking to use any surplus monies that remained from the sale of its land in Subang Jaya to settle TSH's debt to AIF under the facility. Both the AIF-TSH and AIF-HP suits were consolidated and heard together.

Held, allowing AIF's claims in both the AIF-TSH and AIF-HP suits and dismissing TSH's counterclaim:

(1) On balance of probabilities, AIF had proven its claims against TSH and HP both in the main suit and in the consolidated action and it was entitled to the sums it had pleaded against them. However, the total sum that AIF shall receive from both TSH and HP shall not exceed the actual amount that TSH owed to AIF. The claims for *Ta'widh* were also allowed (see paras 65–66, 68 & 71–73).

(2) Based on all the evidence, AIF had proven that the facility agreement, the subsequent variations of the terms thereof, the Efogen SPA and all transactions related to the Efogen SPA were all legally valid including the RM20,250,000 drawdown under the facility for the purchase of the Efogen shares by ATAR. TSH had breached the facility agreement whilst ATAR had breached the Efogen SPA (see para 63).

(3) The court had jurisdiction to hear and determine the 'Shariah issues' raised by TSH without having to refer them to the Shariah Advisory Council for a ruling. TSH, ATAR and HP's arguments that the Efogen SPA contradicted Shariah principles, as there was vagueness/ambiguity with regard to the ownership of the shares, could not be sustained. The evidence clearly showed that all transactions and documents pertaining to the Efogen share sale were legally valid. AIF was the rightful owner of the Efogen shares at all material times, the shares were sold free of encumbrances and ATAR was a bona fide purchaser for value of the shares (see paras 27, 34, 47, 60 & 65).

[Bahasa Malaysia summary

Plaintif ('AIF') telah memberikan ahli perniagaan Tan Sri Halim bin Saad ('TSH') kemudahan pembiayaan jangka pendek RM80 juta ('kemudahan tersebut') untuk membolehkannya membeli sekuriti dalam syarikat Malaysia patuh Syariah yang diluluskan oleh plaintif. Kemudahan tersebut tertakluk kepada konsep Tawarruq perbankan Syariah. Berikutan pelaksanaan perjanjian kemudahan tersebut, AIF mengeluarkan RM20,250,000 di bawah kemudahan tersebut kepada penama TSH, ATAR, untuk membeli 20 juta saham yang dipegang AIF sebagai pemegang gadaian dalam Efogen Sdn Bhd ('saham Efogen'). Apabila AIF memfailkan saman semasa terhadap TSH yang menuntut bayaran sebanyak RM62,031,201.48 bersama Ta'widh (caj pampasan untuk pembayaran lewat) atas alasan TSH telah ingkar di bawah perjanjian kemudahan tersebut, TSH menuntut balas untuk satu deklarasi bahawa keseluruhan transaksi pembelian saham Efogen adalah terbatal kerana melanggar prinsip Syariah dan oleh itu, semua pengeluaran yang telah dibuat oleh AIF di bawah kemudahan untuk membolehkan ATAR membeli saham tersebut adalah tidak sah dan harus dikembalikan kepada TSH. TSH berpendapat bahawa dia tidak mendapat faedah daripada penjualan saham

A Efogen yang dikatakan kepada ATAR kerana, disebabkan pertikaian mengenai pemilikan saham, mereka tidak pernah dipindahkan dan didaftarkan atas nama ATAR. Dalam tindakan berasingan, AIF telah menyaman Hektar Premier sdn Bhd ('HP') sebagai penjamin bagi bayaran RM62,190,325.63 yang terhutang kepada AIF oleh TSH. Saman itu dibuat berdasarkan akujanji B HP untuk menggunakan apa-apa wang lebihan yang tinggal daripada penjualan tanahnya di Subang Jaya untuk menyelesaikan hutang TSH kepada AIF di bawah kemudahan tersebut. Kedua-dua saman AIF-TSH dan AIF-HP telah dicantumkan dan didengar bersama.

C **Diputuskan**, membenarkan tuntutan AIF dalam kedua-dua saman AIF-TSH dan AIF-HP dan menolak tuntutan balas TSH:

(1) Berdasarkan imbangan kebarangkalian, AIF telah membuktikan tuntutannya terhadap TSH dan HP kedua-duanya dalam saman utama D dan dalam tindakan pencantuman dan ia berhak menerima jumlah yang telah diplidnya terhadap mereka. Walau bagaimanapun, jumlah keseluruhan yang AIF akan terima daripada kedua-dua TSH dan HP tidak boleh melebihi jumlah sebenar yang TSH terhutang kepada AIF. Tuntutan *Ta'widh* juga dibenarkan (lihat perenggan 65–66, 68 E & 71–73).

(2) Berdasarkan semua keterangan, AIF telah membuktikan bahawa perjanjian kemudahan, variasi terma di dalamnya, SPA Efogen dan semua transaksi yang berkaitan dengan SPA Efogen semuanya sah di sisi undang-undang termasuk pengeluaran RM20,250,000 di bawah F kemudahan tersebut untuk pembelian saham Efogen oleh ATAR. TSH telah melanggar perjanjian kemudahan manakala ATAR telah melanggar SPA Efogen (lihat perenggan 63).

(3) Mahkamah mempunyai bidang kuasa untuk mendengar dan G menentukan 'isu Syariah' yang dibangkitkan oleh TSH tanpa perlu merujuknya kepada Majlis Penasihat Syariah untuk sebarang keputusan. Hujah TSH, ATAR dan HP bahawa SPA Efogen bercanggah dengan prinsip Syariah, kerana terdapat kekaburan/ketidakjelasan berkenaan dengan pemilikan saham, tidak H dapat dipertahankan. Keterangan jelas menunjukkan bahawa semua urus niaga dan dokumen yang berkaitan dengan penjualan saham Efogen adalah sah di sisi undang-undang. AIF ialah pemilik sah saham Efogen pada setiap masa material, saham tersebut dijual tanpa bebanan dan ATAR ialah pembeli bonafide untuk nilai saham tersebut (lihat I perenggan 27, 34, , 47, 60 & 65).]

Cases referred to

Amanah International Finance Sdn Bhd v Tan Sri Halim bin Saad [2019] MLJU 911; [2021] CLJU 2287, HC (refd)

Bank Pertanian Malaysia Bhd v Rampai Maluri Sdn Bhd [2021] MLJU 266, HC (refd)
Blay v Pollard and Morris [1930] 1 KB 628, CA (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
CIMB Bank Bhd (previously known as Bumiputra-Commerce Bank Bhd) v Zima Properties Sdn Bhd & Ors [2015] 1 MLJ 74; [2014] 6 CLJ 677, CA (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282; [1980] 1 LNS 168, FC (refd)
Edwards v Aetna Life and Casualty 690 F 2d 595, CA (refd)
JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners) [2019] 3 MLJ 561; [2019] 5 CLJ 569, FC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
OJSC Oil Co Yugraneft (In Liquidation) v Abramovich and others [2008] EWHC 2613 (Comm), QBD (refd)
Pan Northern Air Services Sdn Bhd v Maybank Islamic Bhd and another appeal [2021] 3 MLJ 408; [2021] 3 CLJ 34, CA (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (refd)
Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd [2013] 2 MLJ 915, CA (refd)

Legislation referred to

Central Bank of Malaysia Act 2009 s 56(1)(b)
Evidence Act 1950 s 114(g)

David Morais (with Shaikh Abdul Saleem, Pavitra Pillai, Sara Jailanny and Ellia Fatanah) (Shaikh David & Co) for the plaintiff.
Ashok K Raman (with Mohd Faiz Iskandar Hamzah) (Arief & Iskandar) for the defendant.
Khalid Yusof (Abu Talib Shahrom) for the second defendant in counterclaim and defendant in the consolidated matter.

Mohd Radzi Harun J:

INTRODUCTION

[1] There are altogether three actions before me. The original action is between Amanah International Finance Sdn Bhd ('AIF') and Tan Sri Halim bin Saad ('TSH') vide Suit WA-22M-465–09 of 2018 ('main suit'). In that main suit, TSH had filed a counterclaim against AIF and another Abu Talib bin Abdul Rahman ('ATAR') ('counterclaim'). The main suit is consolidated with Suit WA-22M-523–10 of 2018 between AIF and Hektar Premier Sdn Bhd ('HP') ('consolidated action').

[2] In the main suit, AIF claims for RM62,031,201 against TSH for TSH's breach of a financing agreement for a facility described as the Master Equity Secured Financing-i facility agreement dated 9 June 2015 ('the facility').

[3] In his counterclaim, TSH seeks this court to declare that:

(a) the share purchase agreement dated 30 December 2015 entered between AIF and ATAR — TSH's nominee — to finance ATAR's purchase of 20,000,000 shares ('Efogen shares') in Efogen Sdn Bhd ('Efogen') is void;

(b) the drawdown of part of the facility amounting to RM20,250,000 to purchase the Efogen shares is void as it is contrary to Shariah principles; and

(c) the said monies paid for the acquisition of the Efogen shares shall be refunded to TSH.

[4] In the consolidated action, AIF seeks from HP the payment of RM62,190,325.63 being the sums owed by TSH to AIF under the facility, pursuant to the assignment of surplus sale proceeds entered between HP and AIF on 26 January 2017 ('assignment of surplus sale proceeds') where HP has agreed to pay and discharge the outstanding amounts due from TSH to AIF.

[5] I had allowed AIF's claims in the main suit and dismissed TSH's counterclaim. I had also allowed AIF's claims in the consolidated action.

[6] TSH appealed against my decision allowing the main suit. TSH further appealed against my decision in dismissing his counterclaim. HP appealed against my decision in allowing AIF's claims against it in the consolidated action.

[7] This grounds of judgment applies to all three appeals.

BACKGROUND

The plaintiff's case

[8] The brief facts of AIF's case are as follows:

(a) vide its letter of offer dated 13 May 2015 and a Master Equity Secured Financing-i facility agreement dated 9 June 2015 ('facility agreement'), AIF granted TSH the facility, which is a short-term financing arrangement for an amount of RM80m to finance the following:

(i) TSH's purchase of securities in Shariah-compliant Malaysian companies duly approved by the plaintiff; and

(ii) the fees, deposit and costs in relation to the facility.

(b) the method of financing under the facility is in accordance with the Tawarruq concept of Shariah banking system, and subject to the terms and conditions of the facility agreement which include the following:

(i) the facility shall mature on 31 December 2015;

(ii) the facility shall be secured by, among others:

(1) securities comprising:

(a) the shares and warrants of a company, Sumatec Resources Bhd; and

(b) other securities listed on the Bursa acceptable to the plaintiff; and

(2) cash deposit comprising:

(a) six months' worth of profits; and

(b) a cash deposit of RM500,000.

(iii) when AIF determined that the ratio equity of the secured amounts under the facility falls below the required equity ratio of 156%, then AIF may make a margin call to require TSH to remedy the said ratio equity by either requiring TSH to provide further or additional security acceptable to AIF, or reduce the outstanding balance under the margin account to maintain the required equity ratio.

(c) the facility agreement went through the following four variations:

(i) on TSH's request dated 15 January 2016, AIF agreed to vary the facility agreement, among others, to extend the expiry date of the facility agreement to 30 June 2016 and for the execution of a second charge of 21 pieces of land in Johor Bharu as security in favour of AIF ('first variation'). The first variation was concluded by way of a supplementary agreement to the facility agreement dated 2 March 2016; and

(ii) vide AIF's letter dated 18 July 2016 and TSH's letter dated 17 August 2016, the said supplementary agreement was further varied whereby the expiry date was further extended to 31 March 2017, subject to certain other terms and conditions ('second variation').

What is the subject matter of AIF's main suit and the consolidated action?

[9] After the facility agreement between AIF and TSH had been executed, ATAR and TSH were approached by Dato' Razali Rahim, the then CEO of AIF, offering ATAR to purchase the Efogen shares held by AIF. The Efogen shares were pledged by one Johany Jaafar arising from a separate facility between Johany and AIF, which Johany had defaulted.

[10] Relying on Dato' Razali's representation, ATAR agreed to purchase 20 million units of the Efogen shares from AIF for RM20,250,000, and the financing was through TSH's unutilised funds available from the Facility.

[11] It is not disputed that TSH had utilised RM60,297,365 of the Facility to purchase:

(a) shares in a public-listed Malaysian company Sumatec Resources Bhd on 19 June 2015 for RM40,047,365 ('first tranche'); and

(b) 20,000,000 shares in Efogen on 30 December 2015 for RM20,250,000 (second tranche').

[12] AIF's main suit and its consolidated action are only concerned with the second tranche.

The Efogen shares

[13] As indicated earlier, the Efogen shares were registered in the name of Johany and charged to AIF for a separate financing provided by AIF to Johany. Johany defaulted that facility and AIF then exercised its rights as chargee to sell Johany's shares in Efogen. AIF entered into a share purchase agreement with ATAR on 30 December 2015 for the purchase of 20,000,000 shares of Efogen ('Efogen SPA'). ATAR is TSH's nominee. To facilitate ATAR's purchase of the Efogen shares, the purchase price of RM20,250,000 was provided through the second tranche of the Facility.

[14] Those 20,000,000 Efogen shares was subsequently charged back to AIF to fulfill TSH's obligations to secure the Facility with shares of companies listed in the Bursa acceptable to AIF, as required by the facility agreement.

[15] AIF alleged that TSH had defaulted the facility agreement, among others, in the following manner:

(a) failure to fulfil the terms and conditions of the final variation by, among others, failure to pay the deferred selling price of RM60,075,494.06 before the expiry date;

(b) failure to pay the secured amounts;

(c) failure to take steps to remedy the current equity ratio by providing further security and/or reducing the principal amount owing;

(d) failure to maintain the current equity ratio to not lower than 156%; and

(e) consequent to a separate proceeding commenced by Exim Bank against TSH for a sum of USD87,297,656.07 and where the TSH had subsequently entered into a consent judgement with Exim Bank on 15

December 2017 which had adjudged TSH to be severally and jointly liable with a third party to pay Exim Bank a sum of USD90,972,366.07 on or before 30 June 2018, thus prejudicing TSH's ability to discharge his payment obligations towards AIF in accordance with the facility agreement.

[16] Based on the above, AIF filed the current suit against TSH claiming, among others, for the sum of RM62,031,201.48 for the outstanding sum due and owing to AIF as at 31 August 2018, and *Ta'widh* (compensation charges for TSH's late payment).

TSH's and ATAR's case

[17] The brief facts of the TSH's case are as follows:

(a) the existence of the Efogen SPA between AIF and ATAR for the 20,000,000 Efogen shares at the purchase price of RM20,250,000 and that the said purchase price was paid vide the drawdown of the second tranche is not disputed by TSH. TSH also admitted that AIF acquired the said Efogen shares pursuant to rights granted to AIF as chargee in respect of a facility it granted to Johany, a shareholder of Efogen Sdn Bhd;

(b) TSH argued that he and ATAR had agreed for the arrangements to utilise the second tranche of the Facility based on a representation made by AIF's then CEO, Dato' Razali, that the Efogen shares has a value of between RM80–100m and are ready for listing;

(c) TSH alleged that prior to the execution of the Efogen SPA, another third Party, Roziah Ismail, gave notice to the AIF stating her interest in 6,000,000 of the Efogen shares which was still held by Johany as she had paid Johany for those shares in full. This resulted in Roziah Ismail filing an action vide Kuala Lumpur Civil Suit WA 22NCC-451–08 of 251 ('Suit 451') against Johany where she claimed for specific performance against Johany and for the said 6,000,000 shares to be transferred to her;

(d) during the first day of the trial of Suit 451, Roziah Ismail withdrew that Suit 451 when she found out about the Efogen SPA and she filed a new Civil Suit WA-22NCC-333–09 of 2016 ('Suit 333') against Johany, AIF and ATAR claiming for the same 6,000,000 of the Efogen shares. On 13 December 2017 the High Court granted judgment in favour of Roziah Ismail in Suit 333 and ordered Johany to pay Roziah a sum of RM10.5m. Roziah's claim against AIF and ATAR was dismissed. Johany's appeal was dismissed by the Court of Appeal on 13 October 2018;

(e) in the meanwhile a search conducted by TSH at the SSM showed that as at November 2020, one Tan Sri Abdul Rashid Abdul Manaf is the majority shareholder of Efogen and MIDF Amanah Investment Nominees (Tempatan) Sdn Bhd is the minority shareholder;

(f) pursuant to the Efogen SPA, the share transfer forms and Efogen share certificates were delivered to ATAR. But in light of the claims by Roziah, ATAR did not submit the transfer forms and share certificates for registration, and this resulted in Johany Jaafar still, on record, in control of the Efogen shares;

(g) it is TSH's contention that if the Efogen shares were able to be listed with the expected value as represented by AIF's former CEO, he would in turn be able to raise funds and consequently would have a stable cash flow to service the Facility. However, this was not the case as the Efogen shares were unable to be transferred and registered to ATAR and ultimately had no value, which resulted in TSH being unable to service the facility;

(h) TSH and ATAR further argued that AIF failed to ensure the Efogen shares were unencumbered, in breach of the Efogen SPA;

(i) ATAR and TSH further argued that AIF failed to deliver the relevant documents which include:

(i) the 2015 Management Accounts of Efogen; and

(ii) Efogen's company resolution authorising the transfer of its shares.

(j) AIF's failure to furnish those documents had led to the nonregistration of the Efogen shares. Most importantly, ATAR claimed that had he been provided opportunity to sight the 2015 Management Accounts of Efogen he would not had proceeded to purchase the Efogen shares having known the actual value of those shares. Instead, his decision was mainly based on the value of the shares as represented by AIF's then CEO, Dato Razali Rahim;

(k) TSH contended that:

(i) the said Efogen SPA was not Shariah-compliant on the following reasons:

(1) the true owner of the 20,000,000 Efogen shares is unclear, as there are multiple claimants namely Johany, AIF, Roziah, Tan Sri Abdul Rashid Manaf, MIDF, and now ATAR through the Efogen SPA. Such vagueness (Gharar) is not permissible under Shariah banking principle;

(2) AIF as the financier had violated their own 'aqad in the facility agreement by allowing the second tranche to be disbursed to themselves as the seller pursuant to the Efogen SPA. Such utilization of part of the facility is a deviation from the purpose of

the Facility;
(3) there was no prior approval of the plaintiff's Shariah Committee before the conclusion of the Efogen SPA;

(ii) consequent to the status of Efogen SPA as set out above, the Efogen shares are not 'security' as defined in the facility agreement. It follows therefore the condition of the facility agreement had not been fulfilled and therefore the facility agreement must be terminated and declared null and void.

(l) based on the facts and arguments as enumerated above, TSH contended that this court must make a finding that:

(i) the disbursement of the second tranche is invalid and forbidden by Shariah;

(ii) the Efogen SPA shall be declared as void ab initio; and

(iii) consequent to the declaration that the Efogen SPA is void ab initio:
ATAR is entitled to terminate the Efogen SPA; and
TSH is entitled to a refund of all monies paid by him to AIF in respect of all monies disbursed from the Facility to pay for the acquisition of the Efogen shares.

HP's case

[18] HP's main defence against AIF's claims against it was that the said claims are premature, on the following reasons:

(a) when AIF agreed to extend the Facility to TSH pursuant to the Final Variation, HP had agreed to allow TSH to utilise the expected surplus over the sale of a piece of HP's land in Subang Jaya to AIF. This was carried out pursuant to the assignment of surplus sale proceeds dated 26 January 2022 ('HP's Assignment'). AIF argued the HP's Assignment formed part of a security for TSH's extended Facility. When TSH was alleged to have defaulted in the repayment of that extended facility through the main suit, AIF brought the action against HP through the consolidated action;

(b) at all material times, HP's Assignment was not to guarantee TSH's debts pursuant to the extended facility. It is only a promise to indemnify AIF for TSH's default in his repayment of the said facility through the surplus of sale proceeds of HP's land;

(c) the HP land sale transaction has not completed and as such the surplus has not arise as yet;

(d) AIF could only initiate any action against HP after this court concluded its findings on AIF's claims against TSH; and

(e) even if this court finds TSH liable, and the HP land transaction has completed, HP's extent of liability is only confined to the surplus sale proceeds of the HP lands, subject to deductions against the amounts to be paid by HP to its chargor, Maybank Bhd.

FINDINGS OF THIS COURT

Preliminary issue: What was the scope of TSH's counterclaim?

[19] Whilst AIF's claims against TSH, and AIF's claims against HP in the consolidated action are rather straight forward as set out in the earlier paragraphs, I must at the outset resolve what exactly was TSH's counterclaims against AIF and ATAR. This is because AIF's counsels argued that TSH's counterclaim revolves around his challenge on the validity of the facility limiting it only to the second tranche involving the disbursements of RM20,250,000 for the purchase of the Efogen shares. On the other hand, TSH's counsels argued in their submissions that TSH's claims were not limited to only the validity of the second tranche but also AIF's right to claim the first tranche, as the entire actions of AIF with regards to the second tranche transaction has caused tremendous losses to TSH that had the consequential effect in TSH not being able to service the facility.

[20] To resolve this issue, all that needed to be done by this court is to examine TSH's pleadings, as it is trite law that parties are bound by pleadings and parties are not allowed to adduce facts and issues which they have not pleaded. Ramly Ali FCJ in *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944 held:

> It is a cardinal rule In civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see *State Government of Perak v Muniandy* [1986] 1 MLJ 490; [1985] CLJU 117 and *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313; [1989] CLJU 74).

[21] Justice Ramly Ali cited with affirmation the decision of the English Court in *Blay v Pollard and Morris* [1930] 1 KB 628, in holding further that a court's determination on matters before it must be confined only on the issues on the record as pleaded, and if parties desired to raise other issues, these must be pleaded on the record by amendment.

[22] This court would therefore confine its findings on TSH's counterclaim based on his pleadings, which could be summarized as follows:

(a) paras 3–5 of TSH's amended SOD sets out TSH's objection to the plaintiff's assertion on the conclusiveness of the AIF's certificate of indebtedness. TSH alleged that there are manifest error in the statement.

TSH's counsels argued that as the certificate of indebtedness is in question, it follows that the entirety of the Facility is in question and not just the second tranche;

(b) it is trite law that certificate of indebtedness — if no evidence shown any manifest error in the amount and calculation stated therein — would form conclusive evidence of the amount due by a borrower: *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282; [1980] 1 LNS 168 and *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544. In *CIMB Bank Bhd (previously known as Bumiputra-Commerce Bank Bhd) v Zima Properties Sdn Bhd & Ors* [2015] 1 MLJ 74; [2014] 6 CLJ 677, Mohd Zawawi Salleh JCA (as His Lordship then was) delivering the decision of the Court of Appeal held:

> It is axiomatic that a certificate or statement issued pursuant to a conclusive evidence clause is, in the absence of fraud or manifest error on the face of the certificate, determinative of the amount due.

(c) the fact that TSH questioned the AIF's Statement of Account per se does not equate questioning the legality and validity of the Facility as a whole. This must be seen within the context of TSH's pleadings in its entirety;

(d) paras 6–14 of TSH's amended SOD formed the main and substantive part of his defence. And it was based on these main parts of the defence that TSH formulated his counterclaims against AIF. These main part of the amended defence and counterclaims were squarely premised on the second tranche — the part of the Facility amounting to RM20,250,000 which was disbursed to pay for the purchase of the Efogen shares. In these paragraphs of his amended defence, TSH claimed that the Efogen SPA was not Shariah-compliant, and it follows that the disbursement of the relevant amount from the facility to facilitate the purchase of the Efogen shares was not Shariah-compliant. This would result in the Efogen SPA having to be declared as void ab initio and the consequential reliefs as I had indicated in the earlier paragraph — that ATAR, being TSH's nominee, is entitled to terminate the Efogen SPA and all monies, profits and payments shall be refunded to TSH;

(e) the above paragraphs clearly showed the intent on the part of TSH to deal only with the second tranche in his counterclaim. He never intended to make any claims covering the first tranche. His claims for 'the refund of all monies, profits and payments' were intended to only cover the monies, profits and payments related to the second tranche. His arguments that he meant to claim for the entire facility was clearly an afterthought;

(f) apart from the above, paras 4–10 of TSH's Reply to AI F's defence to his counterclaim reinforced the fact that TSH's counterclaim revolves around the second tranche only;

(g) in paras 4–6, TSH pleaded that the *Tawarruq* transactions documents through the variation letters are not bona fide and inconsistent with Shariah principles of *Tawarruq*. This is despite TSH's unequivocal agreements to the variations. TSH alleged that the profits charged by AIF under the Facility is riba' and contrary to Shariah principles; and

(h) In paras 8–10, TSH reinforced his case regarding the Efogen SPA.

[23] Having examined TSH's pleadings as briefly set out above, this court agrees with the submission of AIF's counsels that TSH's challenge on the validity of the facility is only limited to the second tranche. TSH does not plead to challenge the first tranche or the entirety of the facility.

[24] The main issue to be determined by this court in the original action, the counterclaim and the consolidated action, therefore, is only in respect of the second tranche of the facility. But at the same time, this court will address TSH's claims that the *Tawarruq* transactions documents through the variation letters are inconsistent with Shariah principles.

Shariah issues at interlocutory stage

[25] TSH had filed an interlocutory application asking this court to invoke s 56(1)(b) of the Central Bank of Malaysia Act 2009 to refer the following Shariah issues, deemed by TSH as novel, to the SAC of BNM:

(a) whether AIF, an Islamic Financing Institution, is permitted to disburse a facility under *Tawarruq* to finance the purchase of the Efogen shares which due to the reasons as set out in the earlier paragraphs had fallen into non-Shariah compliant shares status;

(b) whether AIF is required to obtain prior approval from its respective shariah committee before the disbursement of facility under *Tawarruq*;

(c) whether AIF is permitted to disburse a facility to finance a third party, ATAR's purchase of the Efogen shares, of whom ATAR is not privy to the facility agreement between TSH and AIF; and

(d) whether AIF is permitted to disburse the said second tranche of the Facility granted to TSH to finance ATAR's acquisition of the Efogen shares which is tainted with Gharar (ambiguity), hence is non-Shariah compliant.

[26] I had dismissed the application having ruled that the issues raised although are Shariah issues, but are not novel. I referred to the Federal Court decision in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561; [2019] 5 CLJ 569, where it was held that the determination of Shariah principles in business and Islamic banking transactions is not to be determined by this court but is within the jurisdiction of the SAC. The Federal Court in *JRI Resources* also held that sub-s 56(1) of the CBMA gives option to the court or arbitrator whether to take into consideration the published ruling of the SAC or refer the Shariah issue to the SAC for ruling. The word 'or' in that section signifies that such option is provided to the court or arbitrator.

[27] Having scrutinised the pleadings of parties and the Shariah issues raised by the defendants, I concluded that the Shariah issues or questions raised by the defendants are not in any manner pertaining to issues that require determination and ruling of the SAC. Instead the issues and questions are pertaining to implementation, operation and execution of various agreements and contractual terms involving the parties. These are issues that are clearly within the jurisdiction and competence of this court to determine. In making such determination, I could refer and take into consideration any published rulings of the SAC, with the assistance of the expert witness to explain them. There is therefore no necessity for this court to invoke sub-s 56(1)(b) to refer such issues to the SAC for ruling. See *Amanah International Finance Sdn Bhd v Tan Sri Halim bin Saad* [2019] MLJU 911; [2021] CLJU 2287.

[28] The Court of Appeal had affirmed this court's decision and held:

(1) We are of the view that the High Court judge is not plainly wrong in his decision not to refer the questions posed by the appellant to the Syariah Advisory Council (SAC) for its ruling. The judge under s 56(1) of the Central Bank of Malaysia Act 2009 ('the CBMA') have the option either to take into consideration any published rulings of the SAC or refer such questions to the SAC for its ruling.

(2) The judge in his grounds of judgment at para 28 had stated that he could refer and take into consideration any published rulings of teh SAC (as per s 56(1)(A) and that there is no necessity for him to invoke sub-s 56(1)(B) by referring the matter to SAC for its ruling.

(3) As such, the judge has not erred in his decision.

(4) Therefore, we find no merits in the appeal to warrant our intervention.

(5) Appeal is dismissed with costs and decision/order of the High Court dated 22 June 2022 is thereby affirmed.

Shariah issues raised during trial

[29] Despite the decision of the Court of Appeal affirming this court's decision as set out above, during the course of the trial, counsels for TSH, ATAR and HP reiterated their arguments at the interlocutory stage that before this court could proceed to make any determination on the disputes of the parties, this court must submit the Shariah issues raised by TSH to the SAC as this court does not have the competence and jurisdiction to deal and decide on those issues. Once the SAC had made its rulings, any which way, only then can this court proceed with the trial and make the appropriate determination.

[30] This court disagreed with TSH, HP and ATAR's counsels.

[31] The Shariah issues raised by TSH are in essence similar with those raised in his interlocutory application as I had elaborated in the earlier paragraphs. They are as follows:

(a) that the variation letters are inconsistent with the *Tawarruq* principle under which the facility was granted as the commodity transactions referred to in the facility agreement had been completed prior to the execution of those letters;

(b) the usage of the second tranche of the facility in the amount of RM20,250,000 for the purchase of the Efogen shares where AIF appeared to be the buyer and the seller of the shares contradicted Shariah principle, raising uncertainty and ambiguity or 'Gharar' as termed under Shariah law; and

(c) as set out in the earlier paragraphs, some portion of the 20,000,000 Efogen shares involved in the Efogen SPA were claimed by one Roziah Ismail. On top of that, a search conducted by TSH at the SSM showed that as at November 2020, one Tan Sri Abdul Rashid Abdul Manaf is the majority shareholder of Efogen Sdn Bhd and MIDF Amanah Investment Nominees (Tempatan) Sdn Bhd is the minority shareholder. TSH concluded that these facts drew ambiguity and vagueness (*Gharar*) as to the true owner of the Efogen shares. This issue formed the crux of TSH's counterclaim against AIF.

[32] TSH argued that based on the above circumstances, the said Efogen SPA was not Shariah-compliant as it involved element of *Gharar* (vagueness). This *Gharar* occurred when during the conclusion of the Efogen SPA the true owner of the 20,000,000 Efogen shares cannot be determined. Such uncertainty and ambiguity is strictly prohibited in Shariah transactions. It follows therefore the disbursement of the secondtranche is invalid and forbidden by Shariah. Consequentially, the secondtranche disbursement for the acquisition of the Efogen shares shall be declared as invalid as it was not in compliance with Islamic principles.

[33] In consonant with this argument, TSH maintained that the Shariah issues that he raised above are issues that must be resolved by the Shariah Advisory Council of the Bank Negara Malaysia ('SAC') pursuant to s 56(1)(b) of the Central Bank of Malaysia Act 2009. This court does not have the jurisdiction to decide on those Shariah issues as they are novel issues and this court has no alternative but to refer those issues to the SAC for its ruling. TSH claimed that consequent to that, this court does not possess the jurisdiction to hear the case in their entirety until the ruling on the Shariah issues he raised are resolved by the SAC.

[34] As the Shariah issues are essentially similar with the issues TSH raised earlier to which this court's decision had been affirmed by the Court of Appeal, I decided to apply the same line of reasons as set out in my grounds of judgment in making a finding that this court possessed the jurisdiction to hear the case in their entirety without having to make any reference to the SAC on the Shariah issues raised by TSH.

[35] Firstly, it is my ruling that the issues raised by TSH are not in any manner pertaining to Shariah principles and law involving Islamic banking. Those are issues and questions pertaining to implementation, operation and execution of various agreements and contractual terms involving TSH, AIF, ATAR and HP.

[36] Secondly, this court does not accept TSH's arguments that as the commodity transactions completion date was earlier than the date of the execution of the variation letters, it rendered the variation letters inconsistent with *Tawarruq* principle.

[37] This court was guided by the evidence of the plaintiff's Shariah expert, Associate Professor Dr Azman Mohd Noor (PW2) on this issue. PW2 explained the concept of *Tawarruq* in detail and testified that the commodity transactions which formed the key element of the *Tawarruq* agreement which was concluded by TSH and AIF had been discussed at great length by the SAC. The SAC had long concluded that *Tawarruq* in the manner as entered into by TSH fully complies with Shariah principles. As for the variation letters, PW2 particularly referred to his expert report (P2) where he made reference to para G 14.6 of the SAC's *Tawarruq* Policy Document dated 28 December 2018 which provides:

> The contracting parties may mutually agree to enter into a new contract that may result in a new debt obligation, whereby the proceeds of the new contract is to be used to settle the outstanding debt obligation arising from the sale and purchase contract under the earlier Tawarruq.

[38] This court agrees with the plaintiff that based on the above ruling, the

final variation letters are consistent with the *Tawarruq* principle.

[39] Thirdly, on the argument that the multiple ownership claims of the Efogen shares rendered the transaction void and non-Shariah compliant as it involved *Gharar*, TSH relied on the writing of one Sheikh Muhammad Taqi Usmani published in the online website Islamicmarket.com, accessible online at https://Islamicmarkets.com/education/basic-rules-of-sale:

(a) there must be certainty as to the ownership of the item/asset to be sold and that the seller shall not sell an item/asset which he does not own; and

(b) the item/asset to be sold must be of some value.

[40] This court found that Roziah Ismail's claims against Johany is considered settled when the Court of Appeal confirmed that Johany shall pay RM10.5m for the transfer of her relevant portion of the Efogen shares to Johany. As such the pledging of those shares by Johany to AIF for a separate facility arrangement between Johany and AIF that led to AIF forfeiting those shares when Johany breached the facility agreement was unequivocally valid. It follows therefore the sale of those shares by AIF to ATAR was valid as AIF was the rightful owner of those shares at that time. It is also this court's finding that the fact that the record of SSM showed Johany's name still appeared as the 'owner' of the relevant portion of the Efogen shares per se does not make Johany as the legal owner as this is merely procedural.

[41] I had further considered the decision of the COA in *Pan Northern Air Services Sdn Bhd v Maybank Islamic Bhd and another appeal* [2021] 3 MLJ 408; [2021] 3 CLJ 34 cited by TSH's counsel in their written submissions. I found the decision of the COA does not in any manner alter the detailed elaborations of the Federal Court in *JRI Resources* which I had referred to in my GOJ earlier.

[42] It is my finding that the Shariah issues raised by TSH, ATAR and HP are not novel Shariah issues that would require ruling by the SAC. There is no reason for this court to refer the issues to the SAC. Thus, this court clearly has jurisdiction to hear and determine all the issues raised in this suit, including the Shariah issues raised by TSH.

Efogen shares were free from encrumbrances?

[43] TSH and ATAR argued that AIF had failed to fulfill its contractual obligations to ensure the Efogen shares are free from encrumbrances, as represented by AIF's former CEO, Dato' Razali Rahim.

[44] This court took cognizance of the fact that TSH and ATAR in another action, WA-22NCC-333–09 of 2016 (Suit 333) had taken the position that the shares were free from encumbrances, and that ATAR was a bona fide purchaser for value of the shares under the Efogen SPA. Based on that position taken by ATAR, the Court had dismissed the action against ATAR in that Suit 333 and made a finding that ATAR was a bona fide purchaser for value and his shares are free from encumbrances.

[45] Based on that finding, this court agrees with AIF's counsel that the principle of judicial estoppel applies to ATAR and TSH in that as they had successfully and unequivocally asserted their position with regards to the shares in that prior proceeding, they are estopped from asserting an inconsistent position in this subsequent proceeding: *Edwards v Aetna Life and Casualty* 690 F 2d 595, *OJSC Oil Co Yugraneft (In Liquidation) v Abramovich and others* [2008] EWHC 2613 (Comm), *Bank Pertanian Malaysia Bhd v Rampai Maluri Sdn Bhd* [2021] MLJU 266, *Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915.

[46] This court further concluded that TSH and ATAR's arguments that Efogen shares were encumbered and therefore the Efogen SPA shall be declared void cannot be sustained on the grounds as intimated by AIF's counsel, to which this court is in total agreement:

(a) ATAR's letter dated 29 December 2015 to AIF which was issued prior to the date of the Efogen SPA which indicated that ATAR agreed to purchase the Efogen shares with full knowledge of the existence of several third party claims including Roziah Ismail, Pelaburan MARA Bhd and PDZ Holdings Bhd;

(b) cl 5 of the Efogen SPA provides clearly ATAR's obligation to resolve and settle all claims made by the third parties in respect of the Efogen shares;

(c) ATAR himself was named as a party to Suit 333 where he successfully absolved the claims against him when he argued and admitted that the Efogen shares were unencumbered and that he was a bona fide purchaser;

(d) recital 3 of the Efogen SPA stated that MIDF Amanah Merchant and Tan Sri Abdul Rashid Abdul Manaf are the registered names of the Efogen shares; and

(e) ATAR admitted in his evidence that Tan Sri Abdul Rashid Abdul Manaf had not make any claims against any person over the Efogen shares ownership.

[47] Based on the above findings, this court rule that the Efogen shares were free from encumbrances, and that ATAR was a bona fide purchaser for value of the shares under the Efogen SPA.

Adverse inference against AIF for failure to call Dato' Razali Rahim as a witness?

[48] ATAR and HP argued that as PW1 had testified that the best person to explain about the Efogen SPA is Dato' Razali, this court shall invoke s 114(g) of the Evidence Act and presume adverse inference against AIF's failure to call Dato' Razali as a witness.

[49] The law on adverse inference is trite. The scope of s 114(g) had been explained in the celebrated case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 where the Supreme Court held that adverse inference can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. If it relates to a document, then it cannot be invoked merely because of failure to produce the particular document but failure to produce material document. If it relates to a witness it cannot be invoked by the mere failure to call any witness, but that witness must be an important witness to the case.

Is the share sale agreement invalid when the Shariah screening checklist was incomplete?

[50] The non-completion of the AIF's Shariah Screening Checklist (P4) was one of the issues raised during the course of the trial. TSH argued that it is mandatory for AIF to complete the Shariah Screening Checklist and subsequently to submit the completed checklist to AIF's internal Shariah Committee to ensure that all matters related to the application of the facility by TSH are Shariah-compliant. Failure on the part of AIF to complete the said checklist had rendered TSH's application for the Facility and the subsequent Efogen shares transaction not being examined by AIF internal Shariah Committee, which is the body that determines Shariah-compliance of those transactions.

[51] When cross-examined by TSH's counsel, Associate Professor Dr Azman Mohd Noor (PW2) agreed that the screening by the AIF's internal Shariah team should be done prior to disbursements of a facility to detect any Shariah non-compliant. According to PW2 the market practice is that the internal Shariah team would conduct the screening to detect any irregularities. If the team found any, it will be brought to the internal Shariah Committee who would then decide whether the irregularities would cause the transaction to be regarded as null and void, or permissible. PW2 gave evidence further that the fact that the screening form was done properly and not affirmed by the AIF

internal Shariah Secretariat per se would not imply that the financing transaction is null and void, as it is only a procedure. During cross-examination, PW2 agreed with the Defendant's counsel that his conclusion that the Efogen shares are Shariah-compliant was based on his assumption that AIF had done all the necessary Shariah screening process on Efogen Sdn Bhd.

[52] It is my ruling that the Shariah Screening Checklist is, as the name suggests, a mere checklist. The existence or otherwise of that checklist form, including the non-filling up of the details in that checklist by AIF's Shariah Secretariat, does not determine the Shariah compliance or otherwise and the validity of the facility and the share sale transactions. For the facility and the share sale agreement to be Shariah-compliant, the applicable fundamentals and principles shall be complied with. These fundamentals had been set out in the Shariah Screening Methodologies set out by the SAC of the SC and SAC of the BNM.

[53] The SAC of the SC, for instance, adopts quantitative and qualitative approach in determining shariah status of securities and shares. The quantitative approach involves business activity benchmarks and financial ratio benchmarks with specific percentages of companies involving in various non-Shariah related businesses.

[54] The non-filling up of the details in that checklist by the Shariah Secretariat of the AIF simply shows incompetence and lackadaisical attitude of those officials. That alone would not make the shares and the share sale agreement invalid.

Revisiting the issue of gharar

[55] This court will reiterate the main issue before this court. By virtue of the Efogen SPA between AIF and ATAR, AIF sold to ATAR 20,000,000 shares in Efogen at the purchase price of RM20,250,000. AIF acquired the said shares pursuant to rights granted to them as a charge in respect of a facility it granted to Johany, a shareholder of Efogen. It is not disputed that ATAR entered into the Efogen SPA with the plaintiff as TSH's nominee, and the entire purchase price was paid to AIF through the second tranche draw-down from the facility granted by AIF to TSH.

[56] In the meanwhile a search conducted by TSH at the SSM showed that as at November 2020, one Tan Sri Abdul Rashid Abdul Manaf is the majority shareholder of Efogen and MIDF Amanah Investment Nominees (Tempatan) Sdn Bhd is the minority shareholder. TSH concluded that such disparity drew ambiguity as to the true owner of the Efogen shares that were the subject of the

share sale transaction, thereupon raising the issue of *Gharar* making the transaction non-Shariah compliant.

[57] Pursuant to the Efogen SPA, the share transfer forms and Efogen share certificates were delivered to ATAR. In light of the claims by Roziah, ATAR did not submit the transfer forms and share certificates for registration, and this resulted in Johany still, on record, in control of Efogen Sdn Bhd.

[58] The status of Efogen involving in halal business is never an issue raised by TSH. As such AIF's arguments that Efogen Sdn Bhd is a Shariah-compliant entity is not disputed by TSH's team. What is being questioned by TSH is the existence of *Gharar* due to uncertainity on the ownership of the Efogen shares and the manner in which the transaction took effect that resulted in the whole share sale being non-Shariah compliant.

[59] This court agrees with the submission of the AIF's counsel that this allegation shall be fully proven by TSH and all that needed to be shown to this court by AIF, on the balance of probabilities, is the existence of a valid contract between AIF and TSH, in this instance undisputedly TSH's nominee who had acted fully on TSH's behalf and with TSH's consent, on the Efogen shares sale transaction.

[60] TSH, ATAR and HP's arguments that the Efogen SPA contradicted Shariah principle as it involved vagueness due to uncertainty of the ownership of the Efogen shares purchased by ATAR utilising TSH's facility cannot be sustained. AIF is clearly the owner of the part of the Efogen shares that had been charged by Johany to AIF.

[61] DW3, HP's director and sole witness, could not assist this court to understand the sale of HP land as he could not explain the documents pertaining to the sale transaction, which documents were obtained by AIF from HP through discovery proceeding. DW3 admitted that HP was controlled by TSH.

[62] Clause 5.03 of the facility agreement provides that the obligation to utilise the Facility for Shariah-compliant activities falls squarely on TSH and not AIF. This clause further provides that if TSH failed to comply with this obligation, AIF 'shall have the right to review, suspend, recall or terminate the Facility.'

[63] Having considered the evidence before this court brought by both parties as set out in the earlier paragraphs, and based on my findings on all the issues raised, I conclude that AIF had successfully proven the legality of the facility agreement, the legality of the subsequent variations of the terms of that

facility agreement culminated in the final variation letter, the legality of the Efogen SPA and all transactions related to that Efogen SPA pertaining to the Efogen shares. TSH had breached the facilities agreement. It is my further conclusion that the Efogen SPA is valid and the drawdown of the second tranche for the purchase of the Efogen shares by ATAR is valid. ATAR had breached the Efogen SPA.

[64] This court also took cognizance of what had transpired in Suit 333 involving both AIF and TSH and Roziah and the fate of the Efogen shares in that proceeding which was made known to this court by both parties.

CONCLUSION

[65] In conclusion, I rule that all transactions and documents pertaining to the Efogen share sales were legally valid. TSH and ATAR had failed to canvass any doubt on AIF's case and AIF had proven its case on the balance of probabilities.

[66] I therefore allow AIF's claims for TSH to pay a sum of RM62,031,201.48 being outstanding amount due and owing to plaintiff as at 31 August 2018 for breach of the facility agreement.

[67] I dismissed all counterclaims by TS Halim.

[68] As for the AIF's claims for *Ta'widh*, I allow it subject to the calculation of the quantum in the manner as prescribed by the SAC in its 50th meeting dated 26 May 2005, 61st meeting dated 24 August 2006 and 100th meeting dated 30 April–1 May 2010 which stated:

(a) court may impose *Ta'widh* at the rate stipulated by the procedures of the court. However, from this rate, the judgement creditor is only allowed to receive compensation date of actual loss; and

(b) to determine actual loss, the SAC agreed to adopt the 'weighted average overnight rate' of Islamic money market as a reference.

[69] I ordered *Ta'widh* against TSH in that manner.

[70] I also allow costs in favour of AIF.

[71] On the Consolidated Claims by AIF against HP, having considered the evidence before me, particularly Clauses 2.1 and 15.4 of HP's assignment, I conclude that HP as the surety had agreed to assume the role of the principle debtor in place of TSH as the original principal debtor, and is therefore liable

to satisfy the full extent of TSH's indebtedness to AIF, which I had found to be in favour of the AIF.

[72] Based on the findings as set out in the earlier paragraphs, I rule that pursuant to the assignment of surplus sale proceeds entered between HP and AIF on 26 January 2017, HP has agreed to pay and discharge the outstanding amounts due from TSH to AIF. Consequential to my findings on TSH's breach of the facility agreement and that the Efogen SPA is valid and enforceable, I allow AIF's claims against HP for the payment of RM62,190,325.63 being the sums owed by TSH to AIF under the Facility and the *Ta'widh*.

[73] However, I must make it clear that the total sum that AIF shall receive following the findings of this court in both suits from both TSH and HP shall not exceed the actual amount due to AIF by the principal debtor TSH.

OBITER

[74] Having appraised myself with the full facts of the case as set out in the earlier paragraphs, I must not fail to take this opportunity to state my observation on the following matters:

(a) AIF has agreed to lend an amount of RM80m to TSH;

(b) the main purpose of the lending was to allow TSH to purchase shares/securities in Shariah-compliant Malaysian companies duly approved by the plaintiff;

(c) it was meant to be a short-term facility — maturing in six months after the date of signing of the facility agreement. Maturing date was on 31 December 2015;

(d) the facility agreement stated that the borrowing shall be secured by numerous means, including shares and warrants of Sumatec Resources Bhd, and securities from companies listed on the Bursa acceptable to the plaintiff;

(e) the requirement of Sumatec shares security had been complied with by TSH. But as for the second security, when the agreement stated that this security shall be raised through other shares from companies listed in the Bursa, one could only interpreted that to mean that TSH will provide shares which are already in his pockets and charge them for this purpose. This is a reasonable deduction when this court took judicial notice of the stature of TSH as a highly successful businessman with substantial amount of shareholding in numerous companies locally and abroad;

(f) however, the facts of this case as I had set out earlier showed that was not the case. AIF went 'out of its way' to offer TSH shares charged to it which

it had forfeited from a third party, and allowing TSH, through his nominee ATAR, to purchase those shares utilising the loan it had granted to TSH, and then place these shares back to IAF as security for the facilities;

(g) in the meantime, AIF had allowed the short-term six month loan metamorphosised into a long term two-year loan through four extensions, enabling all this arrangements and requirements to materialise;

(h) AIF allowed extensions after extensions, despite having issued letters of demand to TSH for TSH's breaches and failures to service the facility; and

(i) in the meanwhile, AIF failed to complete its internal Shariah Screening Checklist, which as I had remarked earlier although does not affect the legality of the transaction but showed utter incompetence and lackadaisical attitude of the relevant officials of AIF.

[75] The above facts demonstrated a transaction which, albeit legal and valid, but arguably tainted with questionable ethics on the part of the relevant AIF officials. I am hopeful that the top management of AIF will take positive measures to improve this.

AIF's claims in both the AIF-TSH and AIF-HP suits allowed and TSH's counterclaim dismissed.

Reported by Ashok Kumar